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Supreme Court of the United States

OCTOBER TERM, 1956

Case No. 743

JOHN ROBERT SHAW, AS EXECUTOR OF THE ESTATE OF ANTHONY ALMA RAHNER, DECEASED PETITIONER,

versus

ATLANTIC COAST LINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY, RESPONDENTS

BRIEF OF THE ATLANTIC COAST LINE RAILROAD COMPANY, RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

PAGE

Citation of Decision of Lower Court Sougth to be Reviewed 1

Question Presented 2

Statement 2

Reasons for Denial of the Writ as to Respondent, Atlantic Coast Line Railroad Company 3

Argument:

a. This Court's decisions concerning Certiorari ... 4

b. South Carolina Law 5

Conclusion 10

TABLE OF AUTHORITIES

Cases PAGE

Atlantic Coast Line Railroad Company v. Glenn, 198 Fed. (2d) 232 8

Baxley v. Atlantic Coast Line Railroad Company, 85 S. E. (2d) 744 8

Bogan v. Southern Railway Company, 179 S. C. 391, 184 S. E. 143 7

Cable Piano Company v. Southern Railway Company, 77 S. E. 868 6

Drawdy v. Atlantic Coast Line Railroad Company, 58 S. E. 780 .....6, 7

Fisher v. United States, 328 U. S. 463; 90 L. Ed. 1382 .. 4

Graver Tank & Manufacturing Co. v. Linde Air Prod. Co., 336 U. S. 271, 93 L. Ed. 672, 676-7 5

Great Atlantic Co. v. Supermarket Equipment Corporation, 340 U. S. 147, 95 L. Ed. 162 5

Griskell v. Southern Railway Co., 81 S. C. 193, 62 S. E. 205 7

Hicks v. Atlantic Coast Line Railroad, 187 S. C. 301, 197 S. E. 819 7

Howell v. Southern Railway Company, 192 S. C. 152, 5 S. E. (2d) 860 .....7, 8

Palmer v. Hoffman, 318 U. S. 109, 87 L. Ed. 644, 144 A. L. R. 719 4

Robinson v. Atlantic Coast Line Railroad, 179 S. C. 493, 184 S. E. 96 7

Virginian Railway Co. v. System Federation, etc., 300 U. S. 515, 81 L. Ed. 789 5

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I

CITATION OF DECISION OF LOWER COURT SOUGHT TO BE REVIEWED

Shaw, as *Executor of the Estate of Anthony Alma Rahner, deceased, appellant, v. Atlantic Coast Line Railway Company, appellees.* 238 F. (2d) 525.

II

QUESTION PRESENTED

Does the record show that the United States Court of Appeals in interpreting and applying the provisions of the Death Statute of South Carolina and of the South Carolina Railroad Crossing Statutes, Committed "egregrious error", or beyond peradventure, misinterpreted such statutes as construed by the Supreme Court of the South Carolina?

Principally involved are the local crossing statutes—Sections 58-743, and 58-1004 of the 1952 Code of Laws of South Carolina, Volume 5, page 825, 880 of such Code. This respondent is sued solely under the State law, whereas, its co-defendant, Southern Railway Company, is sought to be held under the Federal Employer's Liability Act, which has no application here to the Atlantic Coast Line Railroad Company.

III

STATEMENT

We shall not burden this Court with a repetition in detail of the occurrence here concerned, but shall confine ourselves to statements irrefutable from the Transcript of Record as found by the United States District or Trial Court and by the United States Court of Appeals. (Symbols in parentheses including "D. A." pertain to appellee's appendix.)

(1) The deceased was an experienced conductor of the Southern Railway Company, thoroughly familiar with the surroundings and operations incident to the place where he met his death.

(2) The deceased and every other witness present at the time was fully aware of the approach of a non-stop, fast through train of the Atlantic Coast Line Railroad Company on the track of this respondent, which he was seeking

to cross in connection with his Southern Railway Company duties. (D. A. 9, 26.)

(3) The deceased conductor was in complete charge of the Southern Railway train which had come to a full stop, and his last known words constituted a warning to employees under his control that they should protect a little deaf-mute passenger getting off his train from crossing the track on which the Atlantic Coast Line Railroad train was fast approaching. (D. A. 2.)

(4) For an appreciable distance from the north-bound track of the Atlantic Coast Line Railroad where he met his death, with an unobstructed view for more than a mile of the on-rushing train, he began to run to beat his way across when the train was only seconds away from the point of peril. (D. A. 4, 29.)

(5) Both by earlier semaphore, and by lantern signal of the joint telegraph agent, those operating the through train were given clearance to proceed. The racing plaintiff could not be seen by the engineer by reason of his sudden proximity, and the fireman on the side toward the deceased had only a split-second view—too late to do anything but give instantaneous notice that someone had been struck. (D. A. 23, 24.)

IV

REASONS FOR DENIAL OF THE WRIT AS TO RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY

1. No Proper Ground for Certiorari

2. No Evidence of Proximate Negligence on the Part of this Respondent, Causing the Collision

The train was operated in thorough accord with the rules of the Company. Those in charge of the train came ahead on proper signals. The joint telegrapher or station agent had no opportunity to see or foresee that the plain-

tiff, in a period of scarce seconds at some portion of the railroad yards, would make a fool-hardy attempt to outrace the train. In fact, in the unexpected suddenness of the events, he never saw the plaintiff before he was killed, at a place appreciably removed from the accustomed crossing to the station for any passengers of the Southern Railway Company.

Without the necessity of being meticulous to suggest that the plaintiff Rahner was not struck at a "traveled place" within the purview of the South Carolina crossing signal statutes, we submit that under the unfailing interpretations of the local law, he was guilty of sole negligence when he recognized the approach of the brilliantly lighted Coast Line train and attempted to rush across its track ahead of it. Whether the signals of its approach were given or not with all the exactitudes of the statute is of no ~~move-~~ moment ~~ment~~. He needed no bell or whistle to apprise him of its approach, the glaring headlights and noise of approach gave their own warnings before he began to run from a place of safety into the area of peril and death.

V

ARGUMENT

(a) This Court's decisions concerning Certiorari.

The principle of law many times laid down by this Court is that Certiorari will not be granted in a cause governed by local law in the absence of "a plain showing of error," *Palmer v. Hoffman,* 318 U. S. 109, 87 L. Ed. 644, 144 A. L. R. 719; or except when "egregrious error has been committed", *Fisher v. United States,* 328 U. S. 463, 90 L. Ed. 1382.

Furthermore, there are numerous decisions of this Court that it will accept findings of fact concurred in by a District Court and the Court of Appeals not shown to be

clearly erroneous or unsupported by evidence. *Virginian Railway Company v. System Federation, etc.*, 300 U. S. 515, 81 L. Ed. 789; *Great Atlantic etc. Co. v. Supermarket Equipment Corporation*, 340 U. S. 147, 95 L. Ed. 162. See also, *Graver Tank and Manufacturing Company v. Linde Air Prod. Co.*, 336 U. S. 271, 93 L. Ed. 672, 676-7. In the present case as in the foregoing, there is substantial evidence to sustain the findings of fact by the two lower Courts.

(b) The South Carolina Law.

Mr. Mathis, plaintiff's witness, saw Mr. Rahner start to run "as fast as he could" before he reached the South-bound mainline of the Atlantic Coast Line (D. A. 3 and 15). He, Mr. Mathis, heard the Coast Line train approach and also saw its headlights (D. A. 15). Mr. Rahner's last words to this witness were "not to let the porter or the passengers get run over" (D. A. 2). Mr. Rahner could only have referred to the approaching Coast Line train, which was the only train moving in the vicinity, and the Southern train could not move until he returned (D. A. 16).

The movement of the fast North-bound train of Atlantic Coast Line through Hardeeville at 4:00 o'clock A. M. was protected by Mr. Moorer, the dispatcher, whose duty it was to stand outside the station and see that passengers were in places of safety (D. A. 27). He kept his eye on these passengers, ascertained they were safe, and gave his signal to the engineer to proceed (D. A. 27).

On cross examination Mr. Moorer testified he had warned Mr. Rahner about taking unnecessary chances, such as trying to cross in front of approaching trains (D. A. 28). Every witness to the occurrence heard the whistle blowing, saw the reflection of the headlights, regardless of any shrubbery, and heard the train, before Rahner started toward the station. Mr. R. F. Messer, the only actual eye

witness to the death, never saw Mr. Rahner look toward the Coast Line train, but saw him start to run an appreciable distance before he reached the Southbound track (Appellants A. 62-3, D. A. 29).

"The law imposes upon every capable person the duty of observing due care for his own safety when about to cross a railroad track, which necessarily involves the exercise of his senses. While it is ordinarily a question of fact for the jury to say, whether, under the circumstances of the particular case, the traveler did exercise such care, when the facts were undisputed and susceptible to only one inference, it becomes a question of law for the Court." *Cable Piano Co. v. Southern Railway,* 77 S. E. 868.

Almost identical circumstances existed in *Drawdy v. Atlantic Coast Line Railroad Company,* 58 S. E. 980, as here. There "Drawdy passed the witness at a run in an effort to recross the track in advance of the train. From his position when Drawdy passed him, the witness saw and heard the train and knew the impossibility of making a safe crossing. It was manifest from the evidence that Drawdy heard the signal, knew the train was approaching and was running a race with it in his anxiety to get to the station."

In this case Mr. Rahner, a railroad man of many years' experience, thoroughly familiar with the area in question, started running, from a point where he had a clear and unobstructed view, to cross the track in the face of an approaching train (whose brilliant headlights were seen by all) in a mad rush to beat the train.

In the *Drawdy case,* as here, the train was traveling at a high rate of speed; there was an embankment which for a part of the way would obstruct Drawdy's view of the approaching train and some of the witnesses testified they heard a blast of the whistle about 500 yards distance, but did not hear the continued signal required by statute.

There the Court said, "The continued statutory signal could not have given Drawdy (Rahner) more complete warning than he had; and therefore it was not the failure to give the signal, but the neglect of the deceased to heed the notice he had of the near approach of the train, that was the proximate cause of his death."

In *Howell v. Southern Railway Co.*, 192 S. C. 152, 5 S. E. (2d) 860, the plaintiff, an itinerant painter, unfamiliar with the crossing where he was injured, attempted to walk across in the path of an approaching train. Realizing he could not safely traverse the crossing, he jumped but his foot caught in the tracks and was amputated. There was evidence that the train's speed violated the ordinances of the Town of Batesburg. The Court said, "Considering the plaintiff's testimony above, there are only two reasonable inferences to be drawn therefrom. One is that the plaintiff approached the crossing, within a clear view of the approaching train, that he wholly failed to look or listen before going upon the crossing. **If this be true, in going upon the tracks without looking, he was guilty of gross negligence as a matter of law.** *Hicks v. Atlantic Coast Line Railroad Co.*, 187 S. C. 301, 197 S. E. 819; *Robinson v. Atlantic Coast Line Railroad Co.*, 179 S. C. 493, 184 S. E. 96; *Bogan v. Southern Railway Co.*, 179 S. C. 394, 184 S. E. 143. The only other reasonable inference to be drawn from the testimony is that plaintiff; as he approached the crossing, saw the train immediately approaching before going upon the tracks and took the risk of beating it across by jumping. **It is equally well settled in this State that when one undertakes to go over a crossing in front of an immediately approaching train, he is guilty of gross contributory negligence as a matter of law.** *Drawdy v. Atlantic Coast Line Railroad Co.*, 78 S. E. 374, 58 S. E. 980; *Griskell v.*

Southern Railway Co., 81 S. C. 193, 62 S. E. 205." (Emphasis ours.)

Mr. Rahner not only did not look, but started running from a place of safety to cross in front of an approaching train. His actions clearly violated both principles in the *Howell case* where the violation of either one was sufficient to justify direction of verdict.

The *Howell case* was cited as controlling in the case of *Baxley v. Atlantic Coast Line Railroad Co.*, 85 S. E. (2d) 744 where the plaintiff's deceased, who was hard of hearing, walked on a track at night in front of a train and was killed. There was testimony that no statutory signals were given. The Court there stated:

"The testimony adduced by the plaintiff as to fog, dust, crowd of people, number of automobiles and blinding lights, but emphasized more strongly the force of the law which requires that one in such circumstances must use such care in exercise of his sense of sight and hearing as will protect him. The failure to do so amounts to negligence and contributory negligence of such gross nature as to bar recovery." In the instance here the deceased knew of his disabled foot and of the resultant handicap of his recent operation, but took his chance.

In the case of *Atlantic Coast Line Railroad Company v. Glenn*, 198 Fed. (2d) 232, the Court stated:

"The South Carolina Court in construing its State's Statute with respect to crossing collisions, has often reiterated the rule that, despite the negligence of the railroad, a traveller cannot recover who takes no precaution whatsoever at the crossing, when any precaution would have warned him before going on the track and prevented the injury."

"The law regards a railroad crossing as a place of danger. The very presence of such a crossing is notice to

the person approaching or attempting to cross it of the danger of colliding with a passing engine or train * * * and because of the danger, there is imposed upon such person the duty of reasonable care and caution and the reasonable and ordinary use and exercise of his senses of sight and hearing for his own safety and protection, and subject to applicable qualification and limitations, he is required at least to look and listen for an approaching engine or train before venturing to cross the track; and if he fails to exercise such ordinary care, he incurs whatever danger he could have discovered and avoided, and if such failure results in injury he is left without remedy."

Under the South Carolina law as interpreted by its Supreme Court, the petitioner under the facts apparent here is barred from recovery under either the theory that deceased was guilty of sole negligence or the theory of gross contributory negligence or willfullness. As to our co-defendant, Southern Railway Company, which does not have the special defense of contributory negligence and willfullness, we cannot see where in any view of the case it could be held guilty of actionable or proximate negligence under the Federal Employers' Liability Act.

The **sole** negligence principle as applied **by the two Courts below** is equally applicable to both respondents.

VI

CONCLUSION

We respectfully submit the petition here does not meet the requirements of this Honorable Court to justify the granting of Certiorari and that as to the respondent, Atlantic Coast Line Railroad Company, the petition should be denied.

Deferentially submitted,

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BRIEF OF RESPONDENT, SOUTHERN RAILWAY COMPANY, OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

PAGE

Statement of the Case 1

Reasons for Not Granting the Writ:

1. The Trial Court and the Court of Appeals have not disposed of the questions in this case arising under the Federal Employers' Liability Act in a way directly opposed to and in conflict with the applicable decisions of this Court 4

2. The Trial Court and the Court of Appeals have not decided the questions of negligence and willfullness in a way directly opposed to and in conflict with the applicable law of South Carolina 11

TABLE OF CASES

	Page
Atlantic Coast Line R. Co. v. Smalls, 216 F. (2d) 842	9
Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444	4
Brady v. Southern Railway, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239	4
Cahill v. New York, New Haven & Hartford R. Co., 224 F. (2d) 637, 350 U. S. 898, 76 S. Ct. 180, 100 L. Ed. 790	9
Chesapeake & Ohio R. Co. v. Burton, 217 F. (2d) 471	8
Chicago & N. W. Ry. Co. v. Garwood, 167 F. (2d) 848	10
Ellis v. Union Pacific R. Co., 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572	4, 10
Hartley v. Atlantic Coast Line R. Co., 194 F. (2d) 590	6
Jessionowski v. Boston & Main R. Co., 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416	10
Larsen v. Chicago & N. W. Ry. Co., 171 F. (2d) 841	9
Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916	10
Louisville & N. R. Co. v. Botts, 173 F. (2d) 164	10
McAbee v. Southern Ry. Co., 166 S. C. 166, 164 S. E. 444	12
Moore v. Chesapeake & Ohio R. Co., 340 U. S. 573, 71 S. Ct. 428, 95 L. Ed. 547	4, 5
Moore v. Southern Railway Co., 163 S. C. 342, 161 S. E. 525	7
Smalls v. A. C. L. R. Co., 348 U. S. 946, 75 S. Ct. 439, 99 L. Ed. 740	9
Southern Railway v. Moore, 284 U. S. 581, 52 S. Ct. 38, 76 L. Ed. 503	7
Stone v. New York, C. & St. L. R. Co., 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441	9
45 U. S. C. A., Section 51	1
Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497	9
Wolfe v. Henwood, 162 F. (2d) 998, cert. den., 332 U. S. 773, 68 S. Ct. 88, 92 L. Ed. 357	8

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STATEMENT OF FACTS

This is an action brought against Southern Railway Company and Atlantic Coast Line Railroad Company by Petitioner, as Executor of the Estate of A. A. Rahner, a sixty-nine-year-old man, who at the time of his death was employed by Southern Railway as conductor of its passenger train No. 23 running between Columbia, South Carolina, and Jacksonville, Florida. Recovery was sought against Southern Railway under the provisions of 45 U. S. C. A., Sec. 51, and against Atlantic Coast Line Railroad

Company under the South Carolina law, for negligence in operating its train through the station of Hardeeville, South Carolina. The Petitioner claims that Southern Railway Company is liable not only on account of its own alleged negligence, but also for any negligent acts of Atlantic Coast Line at the time and place in question, under the theory that such alleged acts of the Coast Line created an unsafe place for Mr. Rahner to work.

Southern Railway Company trains operate over Atlantic Coast Line tracks from Hardeeville, South Carolina, to Jacksonville, Florida, and it is therefore necessary, when a southbound Southern train comes into the station, for its conductor to secure a clearance card before taking his train onto the Coast Line track. In order to get this card, it is necessary for him to pass through a small parkway between the Southern and Coast Line tracks, then cross over first the southbound and then the northbound Coast Line tracks, before he can reach the station.

Growing in the parkway were some shrubbery and cattails, though none of this growth was of sufficient height and thickness to blot out the lights of an approaching train. The distance from the edge of the shrubbery to the middle of the northbound Coast Line track was twenty-five feet (Respondent's Appendix 17, 20, 21), from which point there is an unobstructed view of the Coast Line track for more than a mile (Petitioner's Appendix 12, Respondent's Appendix 15-16).

On the night in question Train No. 23 arrived in Hardeeville at about four o'clock in the morning, an hour and fifty minutes late. Mr. Rahner got off one of the passenger coaches and told his flagman, Mr. Mathias, "not to let the porter let the little girl get run over" (Respondent's Appendix 2), referring to a little deaf and dumb colored girl who was the only passenger for Hardeeville. He then immediately proceeded alongside the train to the baggage

car where he took some mail from the baggagemaster, Mr. Messer, and proceeded to the station (Respondent's Appendix 29). From the time he passed through the shrubbery, he had an absolutely clear view of both the north and southbound Coast Line tracks (Petitioner's Appendix 12). Just before Mr. Rahner reached the southbound Coast Line track, both Mr. Mathias, the flagman, and Mr. Messer, the baggagemaster (Petitioner's Appendix 18-19, Respondent's Appendix 4, 5, 6, 14-15, and 29), saw him start to run and he continued running until he reached the northbound Coast Line track where he was struck and instantly killed by a fast train.

At the time Mr. Rahner got off his own train, both the flagman who was with him and the baggagemaster had seen the reflection of the lights of the approaching Coast Line train and were aware of its approach (Respondent's Appendix 3-4, 29-30), and Mr. Mathias testified that he had heard its whistle sounding (Respondent's Appendix 15).

The train, at night, was operating with its powerful headlight burning and in addition its Mars light was oscillating, throwing its beams on either side of the track. (Respondent's Appendix 8, 26). The bell was ringing automatically (Petitioner's Appendix 59, Respondent's Appendix 23); the whistle had been blown for the crossing five hundred fifty feet from the station, and the noise of the train's approach was heard by everyone who testified in the case.

REASONS FOR DISALLOWANCE OF THE WRIT

1. The Trial Court and the Court of Appeals have not disposed of the questions in this case arising under the Federal Employers' Liability Act in a way opposed to or in conflict with the applicable decisions of this Court.

The decisions of this Court, without exception, have held that a railroad company, under the FELA, is not an insurer of its employees' safety, but that recovery can be had only in the event that there is proof of negligence which contributes in whole or in part to the injury.

Ellis v. Union Pacific R. Co., 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572;
Brady v. Southern Railway Co., 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239;
Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;
Moore v. C. & O., 340 U. S. 573, 95 L. Ed. 547, 71 S. Ct. 428.

In this case, we contend that there was no proof of any negligence on the part of Southern Railway Company, but on the contrary that the uncontroverted testimony showed that the accident which resulted in Mr. Rahner's death was due to his own sole negligence in running in front of a train which he knew was approaching. There is no conflicting testimony as to how he was injured. Both Petitioner's and Respondents' witnesses testified absolutely that they themselves had seen and heard the train, that there was nothing to have prevented Mr. Rahner from seeing its lights and hearing its approach when he first got off his own train, that he proceeded toward the station in the face of the brilliant headlight and the oscillating Mars light on the oncoming train, and when he was on or approaching the southbound track, which according to every measurement allowed him over thirteen feet before he reached the northbound track, he started to run, ob-

viously in an effort to cross the track ahead of the train, of which he had had a clear and unobstructed view when he was at least twenty-five feet away from the track. There was absolutely no testimony to any other effect.

In addition, it is implicit in the testimony of Petitioner's own witness, Mr. Mathias, that Mr. Rahner was aware of the approach of the train when he got off the passenger coach and told Mr. Mathias to tell the porter "not to let the little colored girl get run over." His own train was at a standstill and would not move until he returned from the station, and, therefore, he could have been apprehensive only of the danger that might ensue if she were to attempt to cross the track ahead of the Coast Line train.

There also was no conflict in the testimony to the effect that Mr. Rahner was not required to hurry to the station to get his clearance card, according to Petitioner's own witness, Mr. Mathias (Respondent's Appendix 13-14).

Thus all the testimony is to the effect that the train was in plain view of Mr. Rahner when he started to run, that he had no reason to hurry, and that the accident was due entirely to his own reckless behavior. As was said by this Court in *Moore v. Chesapeake & Ohio Railway Co.*, 340 U. S. 573, 71 S. Ct. 428, 95 L. Ed. 547:

> "Hence, all the evidence shows is that decedent fell before the train stopped. If one does not believe the engineer's testimony that he stopped after—indeed because of—the fall, then there is no evidence as to when decedent fell. There would still be a failure of proof.
>
> "To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroad practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof."

We think the trial judge was entirely correct in his conclusions that Southern Railway Company was guilty of no negligence, either on account of any thing it did or on account of the operation of the Coast Line train, when he said (Petitioner's Appendix 71-72):

> "* * * The evidence shows that as this fast train approached that station, the whistle was blown, the headlights were on, the visibility was good, everyone around the station, including some who were on the Southern train, heard the warning signals and saw the headlights, including this figure eight headlight that not only illuminates the track a long distance in front of the train but also depicts a figure eight which illuminates and calls attention to people that are even on the side of the track or property adjacent thereto of the approach of the train. And it is a very clear and inescapable conclusion from these facts, from this evidence, that Mr. Rahner saw the approach of that train and heard and knew it was coming. And it is very clear and inescapable that he tried to run across that track in time to clear the track, trying to beat the train and he failed. A most unfortunate accident, a fine employee, of many years of service, experience, who knew the situation there where forty or fifty trains a day were passing over that track."

We think the case at bar is very nearly on all fours with the recent case of *Hartley v. Atlantic Coast Line R. Co.*, 194 F. (2d) 590, where it was held that no recovery could be had for the death of a clerk-telegrapher who was run over while attempting to hand train orders to the crew of a passing train, where the evidence failed to establish that the speed of the train, lack of train signals, oil or creosote on the walkway, or the weather conditions had anything to do with the accident, but on the contrary established that the decedent had not slipped or fallen into the path of the train, but had run onto the tracks in

front of it. It was held that the negligent act of the decedent was the sole proximate cause of his death. The Court said:

> "Upon a thorough examination of all the affidavits, we agree with the court below that the eye-witnesses to the accident were all in agreement that Hartley did not slip, stumble, or fall, into the path of the train, but ran onto the track. As to the other specifications of error relied on by appellant, we fail to find any evidence in any of the affidavits which tends to establish that the speed of the train, lack of train signals, oil or creosote on the walkway, or weather conditions, had any connection with the accident. See *Moore v. Chesapeake & Ohio Ry. Co.*, 4 Cir., 184 F. (2d) 176. There being uncontroverted evidence that the decedent was aware of the approach of the train, and that he ran onto the tracks in the path of the train, it logically follows that his own negligent act was the sole proximate cause of his injury."

In the case of *Moore, Admr., v. Southern Railway Company*, 163 S. C. 342, 161 S. E. 525, an engineer of a train of Southern Railway which had been stopped in a station to meet other trains, was killed when he attempted to cross the main line on which another train was approaching. The Supreme Court of South Carolina held that a violation of the speed ordinances by the second train, when the engineer knew that other trains were at the station and that the deceased had to go to the dispatcher's office and then come back to his own train, was sufficient evidence of negligence to warrant submission of the issues to the jury, and specifically held that there was no error on the part of the trial judge in charging the jury on the question of whether or not the decedent had been furnished a safe place to work. This case was reversed by the United States Supreme Court, *Southern Railway Company v. Moore, Admr.*, 284 U. S. 581, 52 S. Ct. 38, 76 L. Ed. 503, in a very short opinion stating that there was not sufficient

evidence of negligence to sustain a finding that negligence on the part of the railway was the cause of decedent's death.

In the case of *Chesapeake & Ohio R. Co. v. Burton,* 217 F. (2d) 471, Burton was a conductor on a train which was blocking a crossing. While he was attempting to flag traffic, he was struck by a truck. He sued, alleging that the company was negligent in furnishing an engine which was not of sufficient power to pull the train, and in failing to furnish him a safe place to work. Judge Dobie in discussing the proximate cause of the accident, said that even if there had been negligence on the part of the railroad, it was a mere condition and not a proximate cause:

> "After the train had stopped, Burton placed himself in the middle of the road in front of the coal car, in a position from which he could not move without great difficulty. He was struck by a truck driven by a man who admittedly had been drinking. The injuries which Burton received would not have occurred but for his actions and the actions of a third party. Burton himself decided on his course of conduct after the train stalled. He could easily have chosen a safe place or position from which he could have signalled with his torch to approaching drivers of motor vehicles. In such a situation any negligence of the railroad in stopping the train created a mere condition which had no causal connection to the injury received. See *Wolfe v. Henwood,* 8 Cir., 162 F. (2d) 998, certiorari denied, 332 U. S. 773, 68 S. Ct. 88, 92 L. Ed. 357."

In the case of *Wolfe v. Henwood,* cited in the quotation *supra,* plaintiff's intestate was burned to death when he slapped his burning glove on his oil soaked pants. The basis of the suit was a claim that he had not been furnished a safe place to work because no facilities were furnished him to pump water out of the basin where his clothing had become soaked in oil, nor had he been provided with protective clothing or facilities for disposing of the oil soaked waste. The Court in denying recovery said:

"But even if the evidence justified a finding of negligence (which it does not), there was a total failure to establish that negligence of defendant was 'in whole or in part' the cause of the injury. The plain fact is Wolfe sustained fatal injuries as a direct result of his own affirmative and voluntary act in lighting a match while he was soaked with a mixture of gasoline and fuel oil and in attempting to extinguish the flame by slapping his glove on his trousers. Plaintiff argues that Wolfe was an uneducated colored laborer who could not be held to a high standard of care, but that fact cannot create liability in defendant. We hold that the evidence established as a matter of law that Wolfe's negligent act was the sole cause of the accident.

"Plaintiff relies on *Lavender v. Kurn,* 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, and *Ellis v. Union Pacific R. Co.,* 329 U. S. 649, 67 S. Ct. 598, but the holding in these cases, which we have very recently had occasion to follow, *Chicago & N. W. v. Grauel,* 8 Cir., 160 F. (2d) 820, does not reach the fact situation before us. For here, unlike the situation in the *Lavender* and *Ellis cases,* there is positive proof that points unmistakenly to negligence of deceased as the sole cause of the accident."

The Petitioner in his brief has cited and relies upon the following cases to support his contention:

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497;

Smalls v. A. C. L. R. Co., 216 F. (2d) 842, reversed by the Supreme Court in 348 U. S. 946, 99 L. Ed. 740;

Cahill v. N. Y., N. H. & H. R. Co., 224 F. (2d) 637, reversed without opinion, 350 U. S. 898, 76 S. Ct. 180, 100 L. Ed. 790;

Stone v. New York, C. & St. L. R. Co., 344 U. S. 407, 97 L. Ed. 441;

Larsen v. Chicago & N. W. Ry. Co., 171 F. (2d) 841.

All of these can be distinguished from the case at bar by reason of the fact that the alleged injury in each instance was caused by the facilities provided by the employer, and not by the affirmative and voluntary act of the employee.

Also in the case of *Louisville & N. R. Co. v. Botts,* 173 F. (2d) 164, the question was whether or not the employer railroad had been guilty of a violation of the Boiler Inspection Act, 45 U. S. C. A., Sec. 22, *et seq.,* and not whether the alleged violation was the proximate cause of the injury.

Petitioner cites the case of *Chicago & N. W. Ry. v. Garwood,* 167 F. (2d) 848, in support of his contention that Southern Railway through its crew or someone in the station should have warned Mr. Rahner of the oncoming train. Again we state that the facts in that case are entirely different from those here. There the plaintiff was a road foreman who had stepped to the side of the eastbound track to allow a long westbound freight to pass. After it had gone, he stepped on to the eastbound track, at which time he saw an eastbound passenger train, which had come from around a curve only 425 feet away, bearing down on him. As he jumped out of the way, his foot slipped and he fell. The eastbound train had failed to give any warning of its approach as it came around the curve, and the plaintiff there was completely unaware of it. When he became aware of it, he made every effort to save himself, instead of running in front of it.

Again, in the cases of *Lavender v. Kurn,* 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; *Jesionowski v. Boston & Maine R. Co.,* 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416; and *Ellis v. Union Pacific R. Co.,* 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572, there was conflicting testimony as to the cause of the accident which produced the injury. Here we have none.

2. **The Trial Court and the Court of Appeals did not decide the questions of negligence and willfullness in a way directly opposed to and in conflict with the applicable law of South Carolina.**

Negligence cannot be attributed to Southern Railway Company on account of anything that was done by the Atlantic Coast Line. It is true that the Atlantic Coast Line train was late, but the Southern train was also late, and it was for the very purpose of ascertaining whether or not a train of Atlantic Coast Line was proceeding over its tracks that Mr. Rahner was required to secure a clearance card at Hardeeville. The testimony of Mr. Mathias, Petitioner's own witness, was to the effect that Southern Railway rules required that employees expect a movement of trains, engines or cars, on any track, and in any direction, and that they take precautions to protect themselves accordingly. (Respondent's Appendix 5.)

Mr. Moorer, the agent-telegrapher, had performed his duty with reference to protecting the Coast Line train when he had gone out to see that the persons who were there to meet the passenger, the little deaf and dumb girl, had safely passed over the Coast Line tracks and were in the clear where they could not be hurt. He also testified that before giving the Coast Line the green light, he looked to see whether anyone was coming across the tracks. (Respondent's Appendix 27.) He could hardly anticipate that in the face of the oncoming train, whose signals had been heard and whose lights were plainly visible, a railroad man of Mr. Rahner's long experience would at the last instant dart in front of the train. Section 58-743 of the Code of South Carolina, quoted in Petitioner's Brief at pages 12 and 13, requires the ringing of the bell *or* the blowing of the whistle, but not both, and has so been construed by the

Supreme Court of South Carolina in *McAbee v. Southern Railway Company,* 166 S. C. 166, 164 S. E. 444.

Certain it is that no warning which could have been given, no reduction of the speed of the train, or any further signals could have saved Mr. Rahner from the results of his own sole negligence, in dashing in front of a train which was in full view, and of whose approach he was entirely aware from the time that he got off his own train and started for the sation.

CONCLUSION

Petitioner relies upon three points of argument, the same which were relied upon in the District Court and in The Court of Appeals. Each of these courts dismissed the arguments with the clear ruling that "The undisputed evidence in the case is to the contrary." (Opinion of the Court of Appeals for the Fourth Circuit, Petitioner's Appendix 21.)

In conclusion we would reiterate that the accident which caused Mr. Rahner's death was due to his own sole negligence and recklessness in dashing in front of the train, and that the presence of the shrubbery, the speed of the train, the alleged failure to give him further warning than he already had, merely created a condition which had no causal connection with his death. Therefore, we urge that the Petition for Certiorari be denied.

Respectfully submitted,

FRANK G. TOMPKINS, JR.,
Attorney for Respondent, Southern Railway Company.

APR 2 4 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. 743

JOHN ROBERT SHAW, AS EXECUTOR OF THE ESTATE OF ANTHONY ALMA RAHNER, DECEASED, PETITIONER,

versus

ATLANTIC COAST LINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY, RESPONDENTS

PETITION BY SOUTHERN RAILWAY COMPANY FOR A REHEARING

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TABLE OF CASES

PAGE

Eckenrode v. Pennsylvania R. Co., 335 U. S. 329, 93 L. Ed. 41, 69 S. Ct. 91 3

Herdman v. Pennsylvania R. Co., 352 U. S. ...., 1 L. Ed. (2d) 508, 515, 77 S. Ct. 2

Moore v. Chesapeake & Ohio R. Co., 340 U. S. 573, 95 L. Ed. 547, 71 S. Ct. 428 3

Reynolds v. A. C. L. R. Co., 336 U. S. 207, 93 L. Ed. 618, 69 S. Ct. 507 3

Rogers v Missouri Pacific R. Co., 352 U. S. 500, 1 L. Ed. (2d) 508, 515, 77 S. Ct. 1, 2, 3

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PETITION BY SOUTHERN RAILWAY COMPANY FOR A REHEARING

Your Petitioner, Southern Railway Company, respectfully prays for a rehearing herein upon the following grounds:

1. The decision of this Honorable Court, rendered on April 1, 1957, wherein the cause was remanded for trial against Southern Railway Company only, is apparently based upon this Court's decision in the case of *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 1 L. Ed. (2d) 508, 515, 77 S. Ct. ..... Since Respondents' brief in opposition to the granting of certiorari was due to be filed not later than March 2, 1957, and was mailed from Columbia, South Carolina, on February 28, 1957, within three days from the

time the decision in the case of *Rogers v. Missouri Pacific R. Co., supra,* was rendered, we had no notice of the decision and therefore no opportunity to distinguish the facts in that case from those in the case at bar. In fact the advance sheets reporting the *Rogers* opinion had not been published at the time Respondents' brief was filed. We think also that our case is more nearly like the case of *Herdman v. Pennsylvania R. Co.,* 352 U. S. ...., 1 L. Ed. (2d) 508, 515, 77 S. Ct. ...., in that here, as in the *Herdman case,* there were no unusual or extraordinary circumstances or occurrences. Mr. Rahner knew that trains might be expected to approach at any time from any direction; he knew that there was no urgency which required him to rush to the station; he was not caught in a trap, as Rogers was, but instead voluntarily ran in front of the train which killed him.

2. The facts in the *Rogers case* and those in the case at bar can be distinguished for the following reasons:

a. In the *Rogers case,* the plaintiff was in a position which he was forced to take in order to comply with his duty of checking the train for hot boxes and did nothing to bring about his own injury. In the case here, the deceased voluntarily placed himself in a position of danger, without instructions from anyone, he being in complete charge of the operation of his train at the station where he was injured. No one other than the deceased himself did anything to force him to cross the tracks in front of the oncoming train of whose approach he had had full warning.

b. In the *Rogers case,* there was a conflict of testimony as to whether the duties of the deceased demanded that he remain in a position of danger. In the case here, there was no such conflict; every witness, both those for the deceased and those for the defendants, testified that Mr. Rahner was under no duty to hurry in any manner.

c. There was no conflict in the testimony as to the view which Mr. Rahner had of the train at the time he started to cross the tracks. Without variation, each witness testified that from the time he reached a point twenty-five feet from the track on which the train was proceeding, he had an uninterrupted view of the train for more than a mile.

3. We respectfully contend that the case here should be decided upon the principles announced in *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U. S. 573, 95 L. Ed. 547, 71 S. Ct. 428; *Eckenrode v. Pennsylvania R. Co.*, 335 U. S. 329, 93 L. Ed. 41, 69 S. Ct. 91, and *Reynolds v. A. C. L. R. Co.*, 336 U. S. 207, 93 L. Ed. 618, 69 S. Ct. 507. The evidence in this case was all to one effect, and unless believed, there was no explanation as to why the injury occurred. The evidence plainly showed that there was no negligence on the part of the defendant railway which contributed in whole or in part to the unfortunate accident.

4. In addition to the above reasons for urging a rehearing, we are informed that the Court at this time has under consideration a petition for rehearing in the *Rogers case, supra,* and if the Court should reverse or modify that decision, it might well decide to do likewise here.

Respectfully submitted,

FRANK G. TOMPKINS, JR.,
Attorney for Petitioner, Southern Railway Company.

I, Frank G. Tompkins, Jr., Attorney for Petitioner, hereby certify that the within Petition for Rehearing is presented in good faith and is not intended for the purpose of delay.

FRANK G. TOMPKINS, JR.,
Attorney for Petitioner.